UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	
	:	Case No.: 12-52662
LORI GIVENS	:	
	:	Chapter 13
Debtor.	:	
	:	Judge: CALDWELL

DEBTOR'S POST-TRIAL BRIEF ADDRESSING ISSUES SET FORTH IN SCHEDULING ORDER ENTERED ON AUGUST 22, 2017 (ECF 158)

Now comes Debtor LORI GIVENS ("Debtor"), by and through her undersigned counsel, and hereby submits her POST TRIAL BRIEF in further support of her Motion for Contempt and Sanctions ("Motion") against Federal National Mortgage Association ("Fannie") and Seterus, Inc. ("Seterus"). ECF 128.

Following a trial on the Debtor's Motion on August 17, 2017, the Court instructed the parties to present simultaneous briefing to address: (a) whether a violation of the discharge injunction occurred after entry of the Order Granting Trustee's Motion to Deem Mortgage Current, and (b) whether the Court has authority to award emotional distress damages[1]. ECF 158.

I. THE DISCHARGE INJUCTION WAS WILLFULLY VIOLATED

A. PRELIMINARY REMARKS (CLOSING ARGUMENT)

The Debtor's case against Fannie and Seterus provides an intimate look at what often happens when a Chapter 13 debtor who successfully completes a Chapter 13 Plan to pay and cure a residential mortgage, only to later become engaged in a lengthy, distressing and bitter confrontation with a computer-driven, mortgage servicing entity to

[1] Counsel for Fannie and Seterus presented a Bench Memorandum at the close of evidence to attempt to exclude evidence regarding emotional distress damages. The Court determined to take the issue under advisement and consigned argument of the issue to this post trial briefing.

gain what should have been simple compliance with Court orders and procedures to ensure that the debtor's mortgage account is current and back on track with the loan's original amortization schedule. In most settings the mortgage servicer is fully aware of the Court's and Code's requirements, but because of the intricacies embedded in its software programming (its "servicing platform") and because of company policies to overly micro-manage adjustments to mortgage accounts in (or out) of Chapter 13 bankruptcy, the adjustments necessary to fully comply with U.S. Bankruptcy law are all too often unreasonably delayed and sometimes never made.

A Chapter 13 debtor's successful emergence from Chapter 13 should be a genuinely proud and refreshing moment. Yet, when a mortgage servicer fails to take measures to timely adjust a debtor's mortgage account in conformance with Court, Code and Rule mandates, such pride and fresh start are undermined if not completely eviscerated. A Chapter 13 debtor should never be put in a position to compel a mortgage servicer to do what the law so clearly requires. Doing so inevitably forces a debtor to endure long periods of undue stress, aggravation and embarrassment until (and unless) the mortgage servicing entity finally complies. Confrontational telephone calls, angry emails, distressing and incorrect billings, and threats of legal action, bad credit reporting and foreclosure/loss of home are just some of the absurdly difficult things facing a Chapter 13 debtor in one of these emotionally trying situations.

As stated, in most instances, the mortgage servicer is just engaging in business as usual, and is not taking action (or inaction) with the intent to deliberately harm the aggrieved debtor. The entity indisputably has notice of the discharge and other Court orders. But, the entity is just not motivated, for myriad reasons, to timely comply. The entity's culpability becomes a question of simple reckless indifference and not malice.

In the rare circumstance, like here however, representatives of a mortgage servicing company will make the dire mistake of taking the matter personally. Mortgage servicing companies like Fannie and Seterus employ people after all, and people are at times emotionally fragile. They are thus capable of more than reckless indifference. When forcefully confronted with their own failures, they too can become distressed and aggravated – enough so to even engage in petty and spiteful actions that do transcend indifference. While the traditional case of reckless indifference deserves a measured and appropriate response under U.S. Bankruptcy law, it this latter type of case that deserves closer attention and significant deterrence.

The evidence in this case showed, clearly and convincingly, that Fannie and Seterus were well aware of the requirements to deem the Debtor's mortgage account current. Fannie and Seterus received all of the documentation from the Court and took little to no action to timely adjust the Debtor's account. Fannie and Seterus had ample opportunity to comply. Between January 2016 through May 2016, Fannie and Seterus acted with that same general, reckless indifference shown in most cases, by failing to make the proper account adjustments, until it was later forcibly prompted to so by the Debtor, and Debtor's counsel.

In June 2016 however, prior to making more than just minor account adjustments, a particular representative of Seterus (and agent of Fannie) took the matter to a different place entirely. Although the Debtor should not have been put in a position to act in such manner, over time she became understandably persistent in her demands to require

Seterus to comply with the Court's Deem Current Order. The Debtor became aggravated. She went to the Chapter 13 Trustee to get help. She had made all of her post plan completion payments and was not getting satisfaction. The Debtor called Seterus in early June 2016 to vocalize her complaints more vociferously.

During that particularly confrontational telephone call, a Seterus representative took it upon herself to fix the Debtor's wagon. Not liking the Debtor's attitude, this Seterus representative threatened to immediately accelerate the mortgage debt and send the Debtor a Notice of Intent to Foreclose on her home unless the Debtor immediately brought her account current – this, irrespective of the fact that Seterus' account records were incorrect and never fully adjusted. The Debtor's spirited but rational complaints and explanations fell on deaf ears.

However after the call ended, the Seterus representative found out, or perhaps always understood, that Seterus' servicing platform would not permit the issuance of such a foreclosure notice because even with Seterus' incorrect accounting, the Debtor's account was not more than 90 days delinquent. Like many servicing platforms, Seterus' software maintains built-in protections that prevent the issuance of certain foreclosure notices until an account is at least 90 days delinquent. Not to be outdone by a mere machine, the Seterus representative determine to trick the system. On June 14, 2016, she deliberately caused Seterus' servicing platform to make three (3) "Misapplication Reversals" to reverse three months' worth of the Debtor's payments. The deed (and more descriptively, the misdeed) being done, Seterus' servicing platform spit out the June 14, 2016 Notice of Intent to Foreclose.

The Seterus employee would attempt to correct the wrongful reversals on July 1, 2016, but no further action was taken to fully correct the many other compliance deficiencies and negative escrow balances. On July 12, 2016, the Debtor's Counsel filed and served a Motion to Reopen the Debtor's Bankruptcy Case on Fannie and Seterus. It contained a lengthy recitation of the Debtor's complaints, and would have fully apprised any reader that the Debtor was intent on taking legal action to hold Fannie and Seterus in contempt. Based upon this more forcible prompting, Seterus finally took measures to perform account adjustments between July 18, 2016 and July 26, 2016. Yet, Seterus did not notify the Debtor nor her counsel of such mitigation, and continued to allow improper charges to appear on the Debtor's account, inclusive of $15.00 monthly property inspection charges.

Although Seterus made headway in late July 2016 to finally comply with the Court's Deem Current Order, it was apparently not finished causing problems for the Debtor. Indeed, after the Debtor sought to reopen her case, Seterus willfully suspended the Debtor's abilities to make her monthly payments by telephone and/or through web access which were formerly permitted for the prior 8 months, ultimately culminating in causing the Debtor to miss her September 2016 payment – which consequently further resulted in new post plan completion account delinquencies which have persisted, with ongoing new account default charges being put on the Debtor's account up to and through the date of the trial of this matter.

Had Seterus simply taken timely and reasonable steps to perform its legal duty to the Debtor and to the Court to timely comply with the Deem Current Order and Rule

3002.1 Notice, the Debtor would not have been unfairly, and in certain respects, deliberately whipsawed in such a manner.

Fannie and Seterus should be found in contempt and sanctioned. The Debtor should be awarded actual damages, including a sizable amount for emotional distress. The Debtor should be awarded her costs and legal fees and expenses. In addition, given the particularly egregious and deliberate activities of the Seterus employee taken in June 2016, the Court should impose a punitive award in an amount at least equal to the award of actual damages, legal fees and expenses.

B. DISCHARGE INJUNCTION / CONTEMPT STANDARDS

The Debtor's case against Fannie and Seterus presents an amalgam of U.S. Bankruptcy laws, legal theories, and remedies including the U.S. Bankruptcy Court's powers under 11 U.S.C. §105(a); the Discharge Injunction under 11 U.S.C. §524(a)(2); the consequences of a mortgage creditor's failure to properly credit payments received during the performance of a Chapter 13 Plan pursuant to 11 U.S.C. §524(i); and the consequences of failure to reasonably or timely follow this Court's Order Granting Trustee's Motion to Deem Mortgage Current. Distilled to their basest, legal essence, the Debtor's claims and remedies here against Fannie and Seterus sound in contempt proceedings.

1. DISCHARGE INJUNCTION

As set forth in the Deem Current Order, Fannie and Seterus was ordered to "adjust its loan balance to reflect the balance delineated in the original amortization schedule as of the Final Payment Date (through December 2015). Any amounts in excess of that balance, including any alleged arrearages, costs, fees or interest are hereby discharged pursuant to 11 U.S.C. §1328". ECF 116; EX 22 (emphasis added). As a result, Fannie and Seterus were thereby enjoined under 11 U.S.C. §524(a)(2) and (3) from taking any act to collect on those discharged amounts.

The fundamental understanding of the law surrounding, and the consequences of violating, the discharge injunction was aptly and completely explained in the case of *In re Martin*, 2012 Bankr. LEXIS 906 (6th Cir. B.A.P. 2012):

> Section 524(a)(2) of the Bankruptcy Code provides that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any . . . debt [discharged under section 727 . . . of this title] as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2). This subsection, along with § 524(a)(3), is commonly referred to as the "discharge injunction." As the Ninth Circuit recognized,
>
>> the discharge injunction [comes] into force by operation of law upon entry of the discharge. A discharge injunction . . . is . . . an equitable remedy precluding the creditor, on pain of contempt, from taking any actions to enforce the discharged debt.
>
> *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1200 (9th Cir. 2008), aff'd, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) (internal citations omitted). Once a discharge is issued, § 524(a)(2) and (3) makes permanent the protections afforded by § 362's automatic stay and prohibits a creditor from pursuing collection efforts against the debtor personally for debts that were discharged in the bankruptcy proceeding. *Gunter v. O'Brien & Assocs. Co., LPA (In re Gunter)*, 389 B.R. 67, 71 (Bankr. S.D. Ohio 2008). "The purpose of § 524(a) is to afford a debtor a 'fresh start' by ensuring that a debtor will not be pressured in any way to repay a debt after it has been discharged." *Paglia v. Sky Bank (In re Paglia)*, 302 B.R. 162, 166 (Bankr. W.D. Pa. 2003).
>
> Unlike § 362 which specifically provides for the recovery of damages when the automatic stay is violated, §524 does not set forth a remedy for violations of the discharge injunction. However, because
>
>> [s]ection 524(a)(2) not only prohibits but also enjoins [law]suits, as well as other collection actions, . . . the creditor who attempts to collect a discharged debt is violating not only a statute but also an injunction and is therefore in contempt of the bankruptcy court that issued the order of discharge.

Cox v. Zale Del., Inc., 239 F.3d 910, 915 (7th Cir. 2001) (citing *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir. 2000) (recognizing that no private right of action exists for violations of § 524(a), but that "the traditional remedy for violation of [the discharge] injunction lies in contempt proceedings . . . .")).

Pursuant to 11 U.S.C. § 105(a), a bankruptcy court has the power to issue civil contempt orders when a creditor has violated one of Bankruptcy Code's substantive provisions. *McClatchey v. Parsons (In re Lazy Acres Farm, Inc.)*, 134 F.3d 371 (6th Cir. 1997) (unpublished table decision). The purpose of civil contempt is "to compel or coerce obedience to a court order or to compensate a party for another's noncompliance with a court order." *In re Moohaven Dairy LLC*, 461 B.R. 22, 27 (Bankr. E.D. Mich. 2011).

A court may remedy a violation of § 524(a)(2) by awarding damages to the injured debtor pursuant to 11 U.S.C. § 105(a). *Paul v. Iglehart (In re Paul)*, 534 F.3d 1303, 1306 (10th Cir. 2008); *Gunter*, 389 B.R. at 72. In order to recover damages, a debtor must suffer an actual injury. Id. (concluding that bankruptcy court "cannot award damages for violations of the discharge injunction that are technical or inadvertent and do not rise to the level of contempt."). A debtor must prove his injury by a preponderance of the evidence. *McCool v. Beneficial (In re McCool)*, 446 B.R. 819, 823-24 (Bankr. N.D. Ohio 2010). "[A] debtor cannot rely on 'undue conjecture' or speculation, but instead must support its claim of actual injury with 'adequate proof.'" *McCool*, 446 B.R. at 824 (citing *Archer v. Macomb Cnty. Bank*, 853 F.2d 497, 499-500 (6th Cir. 1988)). In addition to an award of actual damages, a debtor may also be entitled to an award of attorney fees "where necessary to effectuate the purposes of the discharge injunction. . ." *Miles v. Clarke (In re Miles)*, 357 B.R. 446, 450 (Bankr. W.D. Ky. 2006).

In order to sanction a party for violating § 524(a), a court must determine that the creditor's actions were willful, "i.e., whether the creditor deliberately acted with [actual] knowledge of the bankruptcy case." *In re Waldo*, 417 B.R. 854, 891 (Bankr. E.D. Tenn. 2009); *Gunter*, 389 B.R. at 72. "[A] willful violation [of § 524(a)] does not require any specific intent. Rather, the question is simply whether, having knowledge of the . . . discharge injunction, the creditor's actions were intentional." *McCool*, 446 B.R. at 823 (citations omitted). A creditor's mistaken belief that its actions were lawful or did not violate § 524(a) is not a defense to a contempt action. Id. ("[A] willful violation of the . . . discharge injunction may still exist even though the creditor believed in good faith that its actions were lawful."); Waldo, 417 B.R. at 892. As the party seeking relief, the debtor has the burden of proving that the creditor willfully violated the discharge injunction by clear and convincing evidence. *Glover v. Johnson*, 138 F.3d 229, 244 (6th Cir. 1998).

2. 11 U.S.C. §524(i)

A creditor also has significant, specifically applicable, statutory duties to the Court and Chapter 13 debtors under 11 U.S.C. §524(i). Application of this section was recently explained in the remarkably similar case of *Ridley v. M&T Bank (In re Ridley)*, 2017 Bankr. LEXIS 1476, 572 B.R. 352 (Bankr. E.D. Ok. 2017). The Court explained:

> 11 U.S.C.S. § 524(i) presents a remedy in cases where a Chapter 13 debtor makes all the required payments on long-term debt required through the life of his confirmed plan, receives a discharge, and is then told that his mortgage is in default, he owes additional charges, and he is threatened with foreclosure. There are two requirements to establish a violation of § 524(i): (1) a willful failure to credit payments received under a confirmed plan; and (2) material injury to the debtor. As in 11 U.S.C.S. § 362(k), the first requirement of willfulness is simply an intent to commit the act; it does not require a specific intent to violate the Bankruptcy Code or plan provisions. It only requires a showing that a creditor intended to credit payments improperly. Absent a creditor's proof that the improper crediting was a mistake in conflict with the creditor's normal procedures, the creditor should be presumed to have intended its acts. Bad faith is not required.

Ridley, 2017 Bankr. LEXIS 1476, *16-17. This case provides exceptional reasoning and insight as to providing a remedy to deter improper conduct. See, also, *Mattox v. Wells Fargo, N.A. (In re Mattox)*, 2011 Bankr. LEXIS 3139, *21-22 (Bankr. E.D. Ky. 2011) – another opinion worthy of close inspection.

Fannie and Seterus were obligated under §524(i) to properly apply all of the payments it received through the Debtor’s Plan. It failed to so, and acted in a dilatory fashion to correct the errors after the entry of the Deem Current Order. Fannie and Seterrus further maintained the charges on Seterus’ books and records, and threatened the Debtor with foreclosure.

3. DEEM CURRENT ORDER

Finally, in this jurisdiction, the Court employs a separate motions practice to encourage mortgage and other creditors to require that long-term debts emerging from Chapter 13 be properly adjusted. From that practice, a Court order is issued and served upon a creditor which contains definite and specific mandates to act. This Court has had occasion to publish at least one recent opinion as to its expectations in the case of I*n re Dibling*, 514 B.R. 254 (Bankr. S.D. Ohio 2014). Describing a similar but less egregious problem, this Court explained:

> The Court now addresses the legal significance and consequences of the preceding events. The May 18, 2010, Order Deeming the Mortgage Current definitely and specifically directed the parties to take actions to reflect the proper status of their relative obligations. See *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 550 (6th Cir. 2006) contempt findings must be premised upon the violation of a definite and specific order). As a result, after receipt of the May 18, 2010, Order Deeming the Mortgage Current, the Creditor was obligated to update immediately its records to reflect that as of March 2010, the Debtors' mortgage was current. However, the Creditor failed to adjust the loan records until three months after the Court entered the Order Deeming the Mortgage Current, and solely on this basis violated the Order at issue. **Timeliness in this regard is essential** to preserving the benefit of making all plan payments and receiving a Chapter 13 discharge. At the end of a Chapter 13 case, both debtors and creditors derive value from having and observing a clear demarcation of their obligations to make and properly credit payments.

Dibling, 514 B.R. at 257-258 (emphasis). And, as recently held in the Sixth Circuit Bankruptcy Appellate Panel:

> The party seeking a contempt order "must establish three elements by clear and convincing evidence: (1) the alleged contemnor had knowledge of the order which he is said to have violated; (2) the alleged contemnor did in fact violate the order; and (3) the order violated must have been specific and definite." *Hunter v. Magack (In re Magack)*, 247 B.R. 406, 410 (Bankr. N.D. Ohio 1999) (citing *Glover v. Johnson*, 138 F.3d 229, 244 (6th Cir. 1998)); *In re Temple*, 228 B.R. 896, 897 (Bankr. N.D. Ohio 1998)). Courts have emphasized that "[w]illfulness is not an element of civil contempt and intent to disobey the order is irrelevant." *In*

> *re Walker*, 257 B.R. 493, 497 (Bankr. N.D. Ohio 2001) (citing *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996)).

Edmondson v. Gordon (In re Gordon), 2017 Bankr. LEXIS 1371, *12-13 (6th Cir. B.A.P. 2017. As stated, all of the Debtor's claims against Fannie and Seterus are rooted in remedies for contempt of court – the discharge injunction through the Deem Current Order.

Below is the Debtor's analysis in SECTION C, D, E, and F of the evidence presented at trial which clearly and convincingly establishes that the Court should issue an order finding Fannie and Seterus in contempt of Court.

C. EVIDENCE ADMITTED AT TRIAL

The parties introduced and the Court admitted the following evidence at trial:

Debtor (Numerical Exhibits):

Lori Givens: Oral, live testimony; (Trial Transcript attached)

Exhibits 1-44 (except the first 7 pages of EX 44 described as a Post Plan Completion Demonstrative Exhibit)

Fannie / Seterus (Alphabetical Exhibits):

Enan Del Rio, Vice President: Oral, live testimony; (Trial Transcript attached)

Exhibits B-G

D. TIMELINE

Supported by the evidence admitted in this matter, the following is a chronology of the salient events that clearly and convincingly establish that Fannie / Seterus willfully violated the Discharge Injunction, §524(i), and the Deem Current Order.

- January 31, 2005: the Debtor executed a Note and Mortgage in favor of America's Wholesale Lender in the amount of $75,000.00 to purchase and secure financing for her residential real estate located at 693 Glenmoor Dr., Columbus, Ohio 43228. EX 1, 2, 3.
- April 4, 2010: the Debtor executed a Home Affordable Modification Agreement with BAC Home Loans Servicing, LP to permanently adjust her mortgage payments on the Note. EX 6.
- September 14, 2011: through its nominee, Mortgage Electronic Registration Systems, Inc., America's Wholesale Lender assigned the Mortgage to Bank of America, N.A., as successor to BAC Home Loans Servicing, LP. EX 4. At some point thereafter, Seterus began servicing the mortgage debt for either or both Bank of America, N.A. or Fannie (see infra).
- March 29, 2012: the Debtor filed a petition, schedules, statement of financial affairs and Chapter 13 Plan ("Plan") under Chapter 13 of the U.S. Bankruptcy Code. EX 7, 8. The Debtor's Plan called for "Conduit Mortgage Payments" to Seterus beginning with April 2012, and a cure of an estimated $3,000.00 pre-petition arrearage. EX 8, pages 3-8.
- May 29, 2012: The Court entered the Order Confirming Chapter 13 Plan. EX 9 (ECF 18).
- July 30, 2012: Seterus, as servicer for Fannie, through counsel, filed a Proof of Claim establishing, *inter alia*, that Debtor owed $965.84 as a pre-petition arrearage to be cured through the Plan.

- September 6, 2012: Bank of America, N.A. officially assigned the Mortgage to Fannie. EX 5.
- December 29, 2015: Seterus's business record described as a Customer Account Activity Statement demonstrates that the Debtor's account reflected a negative escrow balance of at least $2,519.73 as of this date. EX. F, p. 8.
- December 30, 2015: The Chapter 13 Trustee ("Trustee") sent the Debtor a letter informing her that she was nearing completion of her Plan and that her first, post plan completion payment to Seterus would begin in January 2016. EX 15.
- January 12, 2016: The Trustee filed and served his Certification of Final Payment and Case History. EX 16. This document was served upon Seterus and stated that Seterus received the full amount of the pre-petition arrearage of $965.84, and regular monthly payments from April 2012 through December 2015 totaling $27,619.65. EX 16, pg. 2. See, also, EXs 24, 25, 26 (Trustee's internal records showing disbursements to Seterus). Seterus was afforded a 21 day opportunity to object. Seterus did not file an objection.
- January 13, 2016: the Trustee filed a Motion to Deem Mortgage Current and properly served it upon Seterus and Fannie. EX 17 (ECF 107). Based upon the Debtor's successful Plan completion the Trustee' Motion sought to deem the Mortgage loan current through December 2015. Despite being afforded a 21 day opportunity to do so, neither Seterus nor Fannie objected to the Motion.
- January 13, 2016: the Trustee filed a Notice of Final Cure Payment and properly served it upon Seterus and Fannie (ECF 108). EX 18.

- January 15, 2016: After receiving the Trustee's letter dated December 30, 2015 (EX 15), the Debtor called Seterus to make her first required monthly post-bankruptcy mortgage payment (due for January 2016). The answering Seterus representative instructed Debtor to make a partial payment in the amount of $254.89 since according to the representative, there were sufficient amounts contained in an "unapplied funds" account to cover the difference. The Debtor relied upon this representation and made the payment. TR pgs. 24-26; Ex. 44[2] pg 2. Seterus's internal records further establish that Seterus applied the Debtor's payment in full towards January 2016 due date. Ex. F, pg. 8.
- Late January / Early February 2016: the Debtor testified that she received correspondence from Seterus indicating a new monthly payment amount of $576.63. TR pg. 26.
- February 1, 2016: Seterus' records demonstrate that it unilaterally reversed the Debtor's January 2016 payment. EX. F, pg. 8.
- February 2, 2016: Seterus, through counsel, filed its Response to Notice of Final Cure Payment (EX 18), stating unequivocally that Seterus and Fannie agreed that the Debtor had fully cured the pre-petition default, and was current with respect to all payments consistent with 11 U.S.C. §1322(b)(5) making the Debtor's account due for January 1, 2016 (ECF 109). EX 19.
- February 4, 2016: the Court's order entering the Debtor's Chapter 13 Discharge occurred (ECF 112). EX 20. This discharge order was served upon all creditors including Fannie and Seterus.

[2] EX 44 is a compilation of the Debtor's bank statements from Fifth Third Bank. There are 56 total pages in the exhibit and the relevant page numbers are watermarked on the top right of each page.

- February 9, 2016: Seterus, through counsel, inexplicably filed a Notice of Mortgage Payment Change with the Court stating that the Debtor's mortgage payments would change to $689.66 beginning 3/1/2016 (ECF 115). EX 21.
- February 12, 2016: The Court entered the Order Granting Trustee's Motion to Deem Mortgage Current holding, *inter alia*, that the mortgage loan was deemed current through December 31, 2015, and requiring Seterus and Fannie to "adjust its loan balance to reflect the balance delineated in the original amortization schedule" as of December 31, 2015 and, holding that "any amounts in excess of that balance, including any alleged arrearages, costs, fees or interest are hereby discharged pursuant to 11 U.S.C. §1328" (ECF 116). EX 22.
- February 19, 2016: the Debtor made a telephonic initiated payment towards the February 2016 due date in the amount of $576.63. TR pg. 28; EX.44, pg. 9.
- February 22, 2019: Seterus's records reflect that the Debtor's 2/19/2016 payment posted, but that it was applied to a January 2016 due date, thereby showing the Debtor's account as one month behind, in addition to reflecting a negative escrow balance of $1,984.75. EX. F, pg. 7.
- March 21, 2016[3]: the Debtor made a telephonic initiated payment towards the March 2016 due date in the amount of $576.63. TR pg. 28-29; EX. 44, pg. 13. In a Seterus initiated phone call earlier in the day, the Seterus representative had informed the Debtor that she was two months behind on her payments. TR pg. 28. The Debtor informed the representative in a later call after returning home from her job of the Deem Current Order, and requested that her account be corrected. The representative

[3] Aside from the service and delivery of various Court documents (Motion to Deem Current, Deem Current Order, Rule 3002.1 Notices, etc…), this is the first date that the Debtor verbally apprised Seterus that it was obligated by law to properly adjust her account.

stated that he/she would place a note on the account about the Deem Current Order. TR pg. 29.

- March 21, 2016: Seterus applied the Debtor's 3/21/2016 payment towards a February 2016 due date thereby showing the Debtor's account as delinquent in addition to showing a negative escrow balance of $1,773.30. EX. F, pg. 7.
- April 15, 2016: the Debtor made a telephonic initiated payment towards April 2016 due date in the amount of $642.75. TR pg. 31; EX 44 pg. 16.
- April 15, 2016: Seterus posted the Debtor's 4/15/2016 payment and applied it towards the March 2016 due date showing the Debtor's account as delinquent in addition to showing a negative escrow balance of $2,769.16. EX. F pg. 7.
- April 2016: Debtor testified that she physically appeared at the Trustee's offices seeking the Trustee's assistance with Seterus' failure to comply with the Deem Current Order. TR pg. 30. The Trustee's office indicated that a letter would be sent to Seterus requesting compliance with the Deem Current Order. Id.
- May 13-16, 2016: the Debtor made a telephonic initiated payment towards the May 2016 due date in the amount of $669.16. TR pgs. 31-32; EX 44, pg. 20. During the call, a Seterus representative informed the Debtor that she was still behind on her payments. The Debtor again mentioned the Deem Current Order and requested compliance. The Seterus representative told that Debtor she could send a copy of the order to the correspondence department. TR pg. 31-32. Seterus applied the payment on May 13 towards the April 2016 due date and its records continued to reflect that her escrow was in the negative, at this time in the amount of $2,496.90. EX F pg. 7.

- May 31, 2016: The Trustee's Office sent a letter to Seterus enclosing a copy of the Deem Current Motion and Order, and requesting compliance. TR pg. 30; EX. 34.
- June 1, 2016: Seterus sent a "foreclosure avoidance" letter to Debtor stating that she was 31 days past due on her payments, and threatening foreclosure. TR at pg. 32; EX 35.
- **Early June 2016**: the Debtor called Seterus to make her June 2016 payment and to further inquire about the June 1, 2016 letter and the general status of her account. TR pgs. 32-33. The Debtor was eventually transferred to a second Seterus representative who asked her "what her intentions were" pertaining to her home. TR pg. 33. The Debtor became immediately distressed and alarmed. She responded that she did not know why she would be asked such a question when she was making her payments every month. She strongly advised the representative that Seterus needed to follow the Deem Current Order. TR pg. 33. Instead of investigating her request, the Seterus representative responded by threatening the Debtor. The representative stated that unless she brought the account current, the Debtor could expect to receive a notice of intent to foreclose within 7-10 days. TR pg. 33; and also EX 37 (account statement form showing the reversals).
- **June 14, 2016**: In direct accordance with its threat, the Seterus representative unilaterally reversed the three payments the Debtor made in March, April, and May 2016. EX F pg. 6; EX 37. This specific action caused Seterus' servicing platform to permit the issuance of a Notice of Intent to Foreclose.
- **June 14, 2016**: The Seterus software platform properly tricked by the Seterus representative, it automatically generated and sent the Debtor a default notice

threatening foreclosure if Debtor did not "cure this default" by paying $1,263.43 on or before the "Expiration Date" of July 19, 2016. TR pgs. 32-33; EX 36.

- June 16-17, 2016: The Debtor would phone Seterus the next day after she received the 6/14/2016 foreclosure notice during which she reasonably demanded that Seterus re-apply the payments it reversed. TR p. 34. The representative responded that Seterus would not be re-applying the reversed payments, and again informed Debtor that if she did not pay the required amount, Seterus would foreclose on her home. Id.
- June 24, 2016: Seterus applied Debtor's June payment in the amount of $669.16 towards the February 2016 due date (because of Seterus improperly reversed the Debtor's prior 3 payments), thereby showing her account as four months behind. EX F, pg. 6.
- July 1, 2016: Seterus re-applied the three reversed payments, but still showed the account as one month behind. EX F, pgs. 5-6.
- July 5, 2016: Pursuant to Debtor's request, Seterus sent a payoff indicating that debtor was one month behind on her payments. Further, Seterus' records improperly showed that Debtor owed an escrow shortage amount of $2,179.12, and that debtor owed property inspection fees amounting to $555.00. TR pgs. 38-39; EX 39. The payoff was generated nearly 5 months after the Deem Current Order was issued.
- July 8, 2016: In spite of the continuing problems, the Debtor made a telephonic initiated payment towards July 2016 due date in the amount of $669.16. EX F, pg. 5. Seterus applied the payment towards the June 2016 due date, thereby showing her account as one month behind. EX F, pg. 5.

- July 12, 2016: Debtor filed and served her Motion to Reopen her bankruptcy case (ECF 121).
- July 18-26, 2016: After receiving the Motion to Reopen, Seterus finally took measures to make account adjustments to bring loan current. EX F, pg. 5. These adjustments were commenced over five months after the Deem Current Order was issued.
- July 28, 2016: Seterus applied an irregular payment that seemingly brought the loan due date current for August 2016. EX F, pg. 4.
- August 2016 – September 2016: Seterus made further adjustments pertaining to Attorney's Fees and Restricted Corporate Advance Repayment. EX F, pg. 4.
- March 2017: Seterus made a series of adjustments pertaining to property preservation fees, some of which were posted during the pendency of Debtor's bankruptcy case. EX F, pg. 2.
- March 2017-Trial Date: Due in large part to Seterus' failure to properly abide by the law and specific and definite Court orders, the Debtor became mired in the process and did miss payments; largely because Seterus put up road blocks preventing her telephonic and web access, and out of fear that Seterus would not properly account for them. Later, the Debtor even ceased paying upon the belief that Seterus settled the case – only learning later that Seterus withdrew the settlement. The Debtor would attempt to catch up the missed, post-plan completion payments before the trial. TR at 40-62.

E. EXAMINATION OF ENAN DEL RIO'S TESTIMONY AS TO FANNIE / SETERUS' WRONGFUL ACTIONS IN JUNE 2016

The thrust of the Debtor's case is that Fannie and Seterus failed to timely adjust her mortgage account in violation of the law and Court order. Such failure started out as the typical reckless indifference shown by mortgage servicing entities when timely dealing with these situations. However, when the Debtor pushed back, Seterus' representatives took deliberate action to force its system to issue the Debtor the threatening and terrifying notice of intent to foreclose on her home. This type of conduct warrants punishment to deter if from happening in the future.

Fannie and Seterus offered Enan Del Rio's testimony to attempt to diminish the effect of their violations. Yet, much of what was learned from Mr. Del Rio merely confirmed that Seterus indeed, did not properly or timely act with regard to the Discharge Injunction, §524(i) or the Deem Current Order. Mr. Del Rio fully acknowledged that Seterus participated in the Chapter 13 case, filed a claim, and timely received all of the notifications and orders at issue, including the Deem Current Order and Rule 3002.1 Notice. TR. 140-142. Mr. Del Rio further testified that action was not timely taken, and was only taken after Seterus was further prompted to do so in June 2016 when it received the Chapter 13 Trustee's May 31, 2016 letter - over six months following the completion of the Debtor's case and five months following service of the motions, documents, and Deem Current Order. TR. 96, 107. Mr. Del Rio would not go so far as to say that it took additional prompting from the Debtor's counsel (in the form of the Motion to Reopen) to get further compliance from Seterus, but Seterus' additional account adjustments taken just days after receiving Debtor's Motion to Reopen clearly belie Mr. Del Rio's explanations and conclusions. Id.

The testimony offered by Mr. Del Rio as to the nature and manner of the events that took place in June 2016 is not credible and should not be completely believed. Simply put, the actions taken by Seterus to deliberately reverse 3 monthly payments to force its system to issue a notice of intent to foreclose in order to scare the Debtor into curing the incorrect account deficiencies were not justified or even adequately explained by Mr. Del Rio. His explanations were at best self-serving. The Debtor notes the following problems with the believability and respectability of Mr. Del Rio's testimony:

- Mr. Del Rio blamed its bankruptcy counsel for failing to add in all of the pre-petition escrow deficiency to Seterus' original proof of claim. TR 90-96. Yet, Seterus did nothing to instruct its counsel to correct the alleged error for the next 4 years.
- Mr. Del Rio again blamed its bankruptcy counsel for failing to file a response to the Rule 3002.1 Notice of Final Cure Payment that would have accounted for the previously missed pre-petition escrow deficiency. TR 107. Again, Seterus did nothing in the following months to attempt to correct the error which left the ongoing escrow deficiency that should have been deemed discharged. EX F.
- In preparing for the trial, Mr. Del Rio did not even speak to any of the individuals at Seterus who were personally responsible for the June 2016 payment reversals, or the other alleged account corrections in July 2016. Mr. Del Rio's charge was simply to interpret Seterus' records, with which he was familiar, and to provide the Court with an explanation that served the best interests of Seterus. EX F, EX G, TR 111-112.
- Mr. Del Rio admitted that indeed the payment reversals in June 2016 permitted the Seterus' servicing platform to determine that the Debtor's account was sufficiently behind to issue the foreclosure notice. TR 109.

- Mr. Del Rio testified however that the reason for the reversals was not nefarious (in spite of the effect of the notice had on the Debtor) because according to an unsubstantiated email from the "escrow department" to the "transaction processing department" the reversals were requested to "prepare the account" so the transaction processing department could ostensibly perform the "escrow adjustments". TR 111-113. Mr. Del Rio was riffing here, and did not provide a copy of the email, "task notes" or otherwise. Mr. Del Rio could provide no further cogent follow-up explanation in response to the Court's own questioning, except to state that monies had to be reversed in order to be reapplied via inter-departmental requests, coding and exchanges. TR 153-156.
- The actual escrow and other deficiency reversals did not take place for more than a month following this alleged account "preparation" on June 14, 2016. Id. Mr. Del Rio would explain that even when faced with a Federal Court Order requiring immediate action, Seterus simply does not act outside of its normal operating pace to correct matters – self-servingly explaining that all of the "proper approvals" must be in place before changes can be done. TR 113-115. This explanation by itself is obviously troubling.
- However, Mr. Del Rio's explanations are completely dashed by one simple observation:
    - If the June 14, 2016 payment reversals were not committed with bad intentions and were instead only done to "prepare the account" for later processing and coding, then why on July 1, 2016, did Seterus simply reapply the three payments in the same manner as it originally did in March, April and

May, 2016? EX F pgs. 6-7. What is the "magic" between a Code 172 payment and a Code 173 payment? Id. They are both noted as account payments. Indeed, those two codes are used throughout the account history practically interchangeably. Id.

The reality is that Mr. Del Rio was put in too awkward of a position for his testimony about the reason for the June 2016 reversals to be completely credible. There was too much of a time delay between June 14, 2016 to July 1, 2016 to July 18, 2016 to July 26, 2016, together with the Motion to Reopen, and the various complaints made by the Debtor, to chalk Seterus' conduct up to some coincidental, internal corrective measure to comply with the Deem Current Order.

The fact remains that the Seterus did something deliberately to allow its computer system to side-step its internal protection measure to send the Debtor the June 14, 2016 notice of intent to foreclose. Indeed, this letter was sent on the same exact date as the so-called steps to "prepare the account" for account corrections that would not even take place until several weeks later.

The scientific precept of ***Occam's Razor*** bears on this matter. It holds that when you have two competing theories that make exactly the same predictions, the simpler one is the better. Given all of the evidence, inclusive of the Debtor's testimony, the Debtor's theory is the far simpler of the two explanations for the actions taken by Seterus in June 2016 and it should be believed.

F. SUMMATION

In addition to participating the Chapter 13 case, and being on the Court's service lists, Fannie and Seterus admittedly knew of the case-closing processes, discharge documentation and the Deem Current Order as late as mid-February 2016. Except for deleting $375 worth of questionable, post-petition inspections in mid-April 2016, Seterus failed to attempt to properly deem the Debtor's mortgage current until the earliest of July 18, 2017. Fannie and Seterus therefore violated 11 U.S.C. §524(a)(2), 524(a)(3), 524(i) and the Deem Current Order, and should be found in contempt. Moreover, Seterus' deliberate and harmful activities to reverse the Debtor's three payments on June 14, 2016 so that it could issue a notice of intent to foreclose are particularly egregious and should be thoroughly punished.

II. THE COURT HAS INHERENT POWER AND DISCRETION TO AWARD SANCTIONS FOR VIOLATIONS OF THE DISCHARGE INJUNCTION WITH SANCTIONS COMING IN THE FORM OF ACTUAL DAMAGES INCLUDING BUT NOT LIMITED TO DAMAGES FOR EMOTIONAL DISTRESS AND IN APPROPRIATE CIRCUMSTANCES, FOR PUNITIVE DAMAGES

A. STANDARDS

In spite of Fannie and Seterus' beliefs to the contrary the issue of awarding emotional distress damages for violations of the Discharge Injunction and for civil contempt is well settled in this jurisdiction.

Under its civil contempt powers under 11 U.S.C. §105(a), the U.S. Bankruptcy Courts have the authority to sanction a creditor for violating the Discharge Injunction and its orders. *Paul v. Inglehart (In re Paul)*, 534 F.3d 1303, 1306-07 (10th Cir. 2008), cited favorably in *In re Martin*, (6th Cir. B.A.P. 2012) at *15 (supra at pg. 8). The Court is provided broad remedial powers to address transgressions against its orders, including the Discharge Injunction. *Chambers v. GreenPoint Credit (In re Chambers)*, 324 B.R. 326, 329 (Bankr. N.D. Ohio 2009); and *Runfola & Assocs., Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 375-76 (6th Cir. 1996). Because the consequence of such violations invariably affects the debtor in a negative manner, the sanctions issued by the Court are generally intended to compensate for actual damages and to reimburse the debtor for costs and legal fees. Id., citing *In re Goodfellow*, 298 B.R. 358 (Bankr. N.D. Iowa 2003); *Walker v. M&M Dodge, Inc. (In re Walker)*, 180 B.R. 834 (Bankr. W.D.La.1995). As further noted by Judge Speer, in *Chambers*, the Sixth Circuit Court of Appeals has reviewed and approved of this practice in *Miller v. Chateau Communities, Inc. (In re Miller)*, 282 F.3d 874, 875 (6th Cir. 2002).

Emotional distress damages are actual damages and are awardable as part of the sanction for a creditor's violation of the Discharge Injunction / contempt. *In re Perviz*, 302 B.R. 357 (Bankr. N.D.Ohio 2003). *Phillips v. Deutsche Nat'l Trust (In re Phillips)*, 2012 Bankr. LEXIS 1042 (Bankr. N.D. Ohio 2012). Remedies for violations the Discharge Injunction and for contempt are generally viewed as being indistinguishable from remedies for willful violations of the automatic stay under 11 U.S.C. §362(k). *McCool v. Beneficial (In re McCool)*, 446 B.R. 819, 822-23 (Bankr. N.D. Ohio 2010). Emotional distress and punitive damages were discussed by this Court in the case of *In re Johnson*, wherein the Court stated as follows:

> Once the Court has found a willful stay violation, the debtor still must establish actual damages, though the damage provisions of section 362(h) of the United States Bankruptcy Code are mandatory. *In re Clayton*, 235 B.R. 801, 810 (Bankr. M.D. N.C. 1998). Punitive damages are only awarded where the conduct is egregious or vindictive. *In re Clayton*, at 810. The factors to be considered for the award of punitive damages include: the nature of the creditor's conduct, the creditor's ability to pay damages, the creditor's motives, and any provocation by the debtor. *In re Sumpter*, 171 B.R. 835, 844 (Bankr. N.D. Il. 1994). Retaliatory litigation to coerce settlement may serve as the basis for the assessment of punitive damages. *In re Poole*, 242 B.R. 104, 112-113 (Bankr. N.D. Ga. 1999). Emotional distress damages may be awarded without medical evidence, where post-petition collection actions persist, contrary to the belief and hope of debtors that they will no longer have to endure such hardship once they file their bankruptcy case. *In re Poole*, at 112.

In re Johnson, 253 B.R. 857, 861-62 (Bankr. S.D. Ohio 2000). Generally speaking however, emotional distress damages must be more than "hurt feelings, anger and frustration" which are part of life, and are not the types of emotional harm that could support an award of damages. *Springer v. RNBJ RTO LLC (In re Springer)*, 2017 Bankr. LEXIS 2304 *12 (Bankr. E.D. Ky. 2017); citing *Collier v. Hill (In re Collier)*, 410 B.R. 464, 477 (Bankr. S.D. Tex. 2009). There must be some causal link between the harm alleged and the contemnor's conduct. Id.

Moreover, punitive damages are appropriate in the case of vindictive, and egregious behavior. *Johnson*, 253 B.R. at 861. "Where a creditor knew of a debtor's federally protected right and acted intentionally or with reckless disregard of that right, an award of punitive damages may be justified. *Ridley*, 2017 Bankr. LEXIS 1476 *25; and *Springer*, 2017 Bankr. LEXIS 2304 *15 ("creditor's conduct was 'egregious, vindictive, or intentionally malicious.'" *In re Baer*, 2012 Bankr. LEXIS 2849, 2012 WL 2368698 at *10 (6th Cir. BAP 2012) (quoting *In re Bivens*, 324 B.R. 39, 42 (Bankr. N.D. Ohio 2004)). While proof of an overt wrongful intent is not required, it must be shown that the creditor acted in bad faith or otherwise undertook its actions in reckless disregard of the law.).

B. APPLIED TO THE FACTS – EMOTIONAL DISTRESS AND PUNITIVE DAMAGES APPROPRIATE

Fannie and Seterus, in the best of circumstances, in this case, acted with complete disregard to the Debtor's rights, and the Court's orders. The Debtor was required to endure more than a year's worth fear and anxiety over whether her home was going to be foreclosed upon – in the face of Court's orders and her successful completion of her Plan.

As of December 31, 2015, the Debtor was current. Everyone with the exception of Fannie and Seterus were on the same page.

As discussed previously, Fannie and Seterus, for the first five (5) months following completion of the Plan acted with indifference and disregard. They did nothing, except to remove inappropriate post-filing inspection fees. They acted as a big corporate entity does when dealing with a consumer like the Debtor. They did not act with any sense of urgency even though they are directed so by the U.S. Bankruptcy Court. As Mr. Del Rio consistently testified, "you can't just snap your fingers", "proper approvals" no matter the reason must be received and acted upon before account adjustments will be made even when there is a federal court order telling them to do it immediately. TR 113-115. This is reckless indifference. It is contemptuous and should be punished.

After receiving letter and copies of the Deem Current Order again from the Chapter 13 Trustee in June 2016, Seterus did not immediately react. When the Debtor called into complain and make a payment, she was transferred around and then viciously threatened with the loss of her home through foreclosure. In fact, the Seterus representative engaged in computer gymnastics to make sure the threat was initiated. That representative deliberately removed 3 payments so Seterus' platform would issue the offensive notice. This is vindictive and egregious conduct, and it too should be punished.

For her part, the Debtor testified that when Seterus sent the June 14, 2016 foreclosure letter she became "nervous" and "petrified" that Seterus was going to cut off her ability to make further payments (they had refused to speak with her on the phone and cut of her web access) and cause her to lose her home. TR 40-41. In addition, the Debtor described that she was under “a lot of stress” after June 14, 2016. She was taking care of her ill mother during the fall of 2016, and given the events just preceding that time, the Debtor was fearful that Seterus would treat the situation as her abandoning her home – the Debtor was living in state of fear. TR. 45.

The Debtor testified that her experience with Seterus’ activities is “an absolute nightmare. I don't sleep. I cry all the time. I thought I accomplished something by completing my bankruptcy. I figured this was my fresh start, since my son got his fresh start. I thought that was my fresh start. It turned into my first nightmare, and it still is to this day.”. TR 45. She has been put on antidepressants to attempt to deal with the stress, but she understandably explained that: “I'm fearful -- for a company that will not follow a Federal Judge order and tell you, we're the servicer, we can do what we want, absolutely scares me to death. And I just at night think what are they going to do next? So it has affected my life”. TR 46-47.

The Debtor has described more than just hurt feelings and anger. As of the date of the trial, the Debtor has recounted severe stress that is directly connected to the wrongful actions (and inactions) of Seterus. This is the very type of emotional distress that should be addressed and compensated.

III. CONCLUSION

It remains anyone’s guess if Fannie and Seterus will permanently adjust the Debtor’s account to fully comply with the Deem Current Order. Based upon their conduct thus far however, they deserve to be found in contempt and appropriate damages should issue inclusive of punitive damages.

Respectfully submitted,

NOBILE & THOMPSON CO., L.P.A.

/s/ James E. Nobile
Michael B. Zieg (0066386)
Eric E. Willison (0066795)
James E. Nobile (0059705)
4876 Cemetery Road
Hilliard, Ohio 43026
Phone: 614.529.8600
Fax: 614.629.8656
mzieg@ntlegal.com
eewillison@earthlink.net
jenobile@ntlegal.com
Counsel for Debtor

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on OCTOBER 18, 2017, a true and accurate copy of the foregoing DEBTOR'S POST-TRIAL BRIEF

- Via the Court's electronic filing system, upon all parties of record, including:
  The US Trustee
  The Chapter 13 Trustee
  David A. Lockshaw, Jr., Counsel for Seterus

- Via email upon further counsel for Seterus:
  Doran Yitzchaki

- By regular U.S. Mail, postage pre-paid, upon:

  Lori Givens
  693 Glenmoor Dr.
  Columbus, OH 43221

/s/ Michael B. Zieg
Michael B. Zieg (0066386)
Nobile & Thompson Co., LPA